D' SOUZA (A.P.)

v.

DIRECTOR OF PUBLIC PROSECUTIONS

HOUSE OF LORDS
LORD KEITH OF KINKEL, LORD ROSKILL, LORD JAUNCEY OF TULLICHETTLE, LORD LOWRY, LORD BROWNE-WILKINSON
15 OCTOBER 1992

CRIMINAL LAW: Conviction and conditional discharge for assault of police officers in the execution of their duty contrary to s. 51(1) of the Police Act 1964 - Appeal - Whether police were acting in the execution of their duty at the time of assault - Entry by force without a warrant of the premises where the assault occurred - Whether police entitled to so enter - Section 17(1)(d) of the Police and Criminal Evidence Act 1984 - Whether police in "hot pursuit" of person unlawfully at large - Meaning of "unlawfully at large" and "hot pursuit".

Edwin D'Souza, his wife ('the patient'), who had a history of mental illness, and his daughter, the appellant Clarissa D'Souza, lived together at 28a Hampton Road Worcester Park ('the house'). On 13 October 1988, a social worker pursuant to s. 135 of the Mental Health Act 1983, obtained warrants to enter the house, went there with police officers and two medical practitioners and gained entry. The patient was then taken to the psychiatric unit of the Sutton Hospital. According to s. 135, detention was lawful for 72 hours after her arrival. Pursuant to s. 132(2), the social worker interviewed the patient and applied for her to be admitted to the hospital for assessment, and she was so admitted at 1 p.m. on 13 October 1988, on the recommendation in writing of two approved medical practitioners. The Crown Court resolved against the appellant an issue concerning the lawfulness of the patient's admission to and detention in hospital. This was affirmed by the Divisional Court.

Edwin D'Souza applied for the discharge of the patient from the hospital. On 16 October 1988, he went to see the patient at the hospital, leaving at 3.30 p.m. By 3.55 p.m. the patient was at the house. Three police constables (in uniform), and two nurses went to the house, arriving at about 7 p.m., intending to return the patient to the hospital. The officers reasonably believed that the patient was in the house, and that she was unlawfully at large. The appellant Clarissa D'Souza declined to open the door, although the officers threatened entry. The glass panel of the door was broken and entry effected. The officers were attacked by the appellant.

On 13 March 1989, Edwin D'Souza and the appellant were convicted and conditionally discharged. They were ordered to pay compensation and costs. Both appealed, first to the Crown Court, then to the Divisional Court. Both the appeals were dismissed, but the Divisional Court certified two questions as being of public interest. They were:

1. Is a person who is lawfully detained pursuant to s. 2 and Part II of the Mental Health Act 1983 deemed to be in legal custody by virtue of s. 137 of that Act, or otherwise?

2. Does the power to enter premises by force without a warrant conferred by s. 17(1)(d) of the Police and Criminal Evidence Act 1984 ("PACE") require that the person exercising that power is in hot pursuit of the person who is unlawfully at large, and if so, what does 'hot pursuit' mean?

Section 17(1) of PACE provides that a constable may enter and search any premises for the purpose, *inter alia*, (d) of recapturing a person who is unlawfully at large and whom he is pursuing.

Held:

[1] According to the view which the Court had taken on the issues, neither of the certified questions needed to be answered. If the first question had to be answered, it would be in the negative. And the second question introduced an element of confusion with reference to 'hot pursuit'.

[2] The statutory provision relied on by the police was s. 17(1)(d) of PACE, and therefore, to justify entry for the purpose of recapturing the patient, she has to be a person (1) who was unlawfully at large and (2) whom the police were pursuing.

(a) Section 18 of the Act of 1983, which deals with absence without leave having been granted under s. 17, must be contrasted with escaping from legal custody or from a form of constraint which is deemed to

amount to legal custody, as described by ss. 137 and 138 of the Act of 1983. None of the three things required or authorised to be done to a person under s. 137(1) was consistent with the plight of the patient before she went absent from the hospital. A person who is absent from the hospital without leave is not for **that reason alone** to be deemed to be a person who has escaped from legal custody. The patient in the present case was merely absent without leave and was not within the terms of s. 137.

(b) The expression "unlawfully at large" does not have a technical or special meaning. A person who is detained in hospital under s. 6(2) is lawfully detained. If he goes absent without leave, he is then at large, and since he ought not to be at large, he would inevitably appear to be unlawfully at large until he is taken into custody.

(c) There was no evidence from which pursuit by the constables before breaking in can be inferred. What s. 17(1)(d) of PACE requires is pursuit by the constable in addition to an intention to arrest followed by resort to the premises where he reasonably believes that the person he is seeking can be found. Entry without a warrant under para (d) of s. 17(1) of PACE for the purpose of recapturing a person who was unlawfully at large could be made only if the constable were **pursuing** that person and not in any other circumstances.. There must be an act of pursuit, that is a chase, however short in time and distance. It is not enough for the police to form an intention to arrest, which they put into practice by resorting to the premises where they believe that the person whom they seek may be found.

[Case to be remitted to the Crown Court with a direction (1) to revoke the orders that the appellant be conditionally discharged and that she pay compensation and (2) to dismiss the charges brought against her].

Cases referred to:
Edwards v. Bairstow [1956] AC 14 ***(refd)***
Hart v. Chief Constable of Kent [1983] R.T.R. 484 ***(refd)***

Legislation referred to:
Air Force Act 1955, s. 116
Army Act 1955, s. 116
Criminal Law Act 1967, ss. 2, 3,
Criminal Law Act 1977, ss. 6, 7, 8, 10
Courts-Martial (Appeals) Act 1968, s. 16
Magistrates' Courts Act 1980, s. 76
Mental Health (Scotland) Act 1960, s. 83 (Scotland)
Mental Health Act 1983, ss. 2(1), (4), 6(1), 13(2), 17(3), 46(1), 128, 135, 135(2), 137, 138
National Assistance Act 1948, Part III
National Health Service Act 1977, Schedule 8
Naval Discipline Act 1957, s. 63
Police Act 1964, s. 51(1)
Police and Criminal Evidence Act 1984, s. 17(1)-(6), 119 (2), Schedule 7
Public Order Act 1936

Other sources referred to:
Foster's Crown cases, 3 Edn., (1792) p. 320
Torts, Clerk & Lindsell, 16 Edn., (1989)
The Police and Criminal Evidence Act 1984, Professor Michael Zander, 2nd Edn., (1990) p. 42

JUDGMENT

Lord Keith of Kinkel

My Lords,

For the reasons given in the speech to be delivered by my noble and learned friend Lord Lowry, which I have read in draft and with which I agree, I would allow this appeal and make the order which he proposes.

Lord Roskill

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Lowry. I agree with him. For the reasons he gives I would allow this appeal and remit the case stated to the Crown Court with the directions which my noble and learned friend proposes.

Lord Jauncey of Tullichettle

My Lords,

I have read the speech of my noble and learned friend Lord Lowry and, for the reasons which he gives, would remit the case stated to the Crown Court with the directions which he proposes.

Lord Lowry

My Lords,

On 13 March 1989 the appellant was convicted and conditionally discharged by the Sutton Justices for assaulting three police officers in the execution of their duty contrary to s. 51(1) of the Police Act 1964. Her father, Edwin D'Souza, was at the same time convicted and

conditionally discharged for similarly assaulting one constable. Both defendants were ordered to pay compensation and costs and both appealed to the Crown Court at Croydon, which on 20 March 1990 dismissed their appeals. The appellant appealed by case stated to the Divisional Court of the Queen's Bench Division (Nolan LJ and Otton J), which dismissed her appeal but certified two questions as being of general public importance. They were:

1. Is a person who is lawfully detained pursuant to s. 2 and Part II of the Mental Health Act 1983 deemed to be in legal custody by virtue of s. 137 of that Act, or otherwise?
2. Does the power to enter premises by force without a warrant conferred by s. 17(1)(d) of the Police and Criminal Evidence Act 1984 require that the person exercising that power is in hot pursuit of the person who is unlawfully at large, and if so, what does 'hot pursuit' mean?

The appellant, who appeals by leave of your Lordships' House, had indeed assaulted the police officers and the propriety of convicting her depended on whether at the time of the assaults the police were acting in the execution of their duty. The answer to that question depended in turn on whether the police were entitled to enter by force without a warrant the premises in which the assaults occurred.

The facts, as found by the Crown Court, were that Edwin D'Souza, his wife Clara (the patient) and the appellant lived at 28a Hampton Road Worcester Park (the house). The patient had a history of mental illness. A social worker approved under the Mental Health Act 1983 (the Act), who had seen the patient's hospital notes and had been in touch with local residents and police, was concerned about her welfare and on 21 July 1988 went to the house to speak to the occupants. He was told to go away. On 13 October 1988 the social worker pursuant to s. 135 of the Act obtained warrants to enter the house, went there with police officers and two medical practitioners and gained entry. The patient was examined by the doctors and taken to Sutton Hospital, of which the Chiltern Wing is a psychiatric unit covering the area in which the house is situated. According to s. 135, detention of the patient was lawful for 72 hours after her arrival. Pursuant to s. 13(2) of the Act, the social worker interviewed the patient and applied for her to be admitted to the hospital for assessment, and she was so admitted at 1 p.m. on 13 October 1988 on the recommendation in writing of two approved medical practitioners. The Crown Court resolved against the appellant an issue concerning the lawfulness of the patient's admission to and detention in hospital. The Divisional Court affirmed the Crown Court's view on that question and it has not been reopened in this appeal.

The further facts relevant to the questions for decision by your Lordships are set out in the case stated:

> The appellant Edwin D'Souza applied for the discharge of the patient, his wife, from hospital.
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> On 16 October 1988, he went to see the patient at the hospital, leaving at 3.30 p.m. By 3.55 p.m. the patient was at the house.
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> That day P.C. Pollard went to the Chiltern Wing of the hospital, was shown documents and believed that the patient was unlawfully at large. Later, with P.C. Beavan, P.C. Robbins and two nurses he went to the house, arriving at about 7 p.m. intending to return the patient to the hospital.
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> The officers all reasonably believed (as was the fact) that the patient was in the house, and that she was unlawfully at large.
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> The officers were in uniform. There was no response when the door was knocked. They made it known they wanted to speak to the patient, they were there to take her back to hospital. Clarissa D'Souza said they would not open the door, she screamed 'don't open the door' and declined to open it although the officers threatened to force entry.
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> The glass panel of the door was broken and entry effected. The appellants had been told that the officers were there to take the patient back to hospital.
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> We accepted the evidence of the officers. Where there was a conflict we preferred the evidence called on behalf of the respondents in the appeal (in the Crown Court) to that of the appellants.
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> We found the officers were attacked by the appellants. We disbelieved the first appellant's evidence that he first became involved in violence when he remonstrated with police for manhandling his daughter and was, for no reason, kicked by a police officer. We disbelieved the second appellant when in evidence she denied biting.

The personal violence was initiated by Clarissa D'Souza who had taken up an umbrella as a weapon and used it to strike P.C. Pollard above the eye. She struck P.C. Beavan in the cheek and bit his arm when he took hold of her arm.

Edwin D'Souza grabbed P.C. Beavan from behind. When P.C. Beavan turned, Edwin D'Souza punched him in the stomach.

When P.C. Robbins, who had been at the back of the house, went in and took Clarissa D'Souza's arm after she struck P.C. Beavan with the umbrella, she bit him and tried to hit him with the umbrella. At the time of the hearing P.C. Robbins had a scar on his arm which we accepted resulted from that bite. Evidence of Dr. Chan was read, unchallenged.

(In the fourth paragraph of the foregoing findings the words "as was the fact" must refer to the belief that the patient was in the house, since it was partly a question of law whether the patient was unlawfully at large.)

The justification for entering the house must be sought in s. 17 of the Police and Criminal Evidence Act 1984 (PACE), which provides:

17(1) Subject to the following provisions of this section, and without prejudice to any other enactment, a constable may enter and search any premises for the purpose -

(a) of executing -

(i) a warrant of arrest issued in connection with or arising out of criminal proceedings; or

(ii) a warrant of commitment issued under s. 76 of the Magistrates' Courts Act 1980;

(b) of arresting a person for an arrestable offence;

(c) of arresting a person for an offence under-

(i) section 1 (prohibition of uniforms in connection with political objects), 4 (prohibition of offensive weapons at public meetings and processions) or 5 (prohibition of offensive conduct conducive to breaches of the peace) of the Public Order Act 1936;

(ii) any enactment contained in ss. 6 to 8 or 10 of the Criminal Law Act 1977 (offences relating to entering and remaining on property);

(d) of recapturing a person who is unlawfully at large and whom he is pursuing; or

(e) of saving life or limb or preventing serious damage to property.

(2) Except for the purpose specified in paragraph (e) of subsection (1) above, the powers of entry and search conferred by this section-

(a) are only exercisable if the constable has reasonable grounds for believing that the person whom he is seeking is on the premises; and

(b) are limited, in relation to premises consisting of two or more separate dwellings, to powers to enter and search -

(i) any parts of the premises which the occupiers of any dwelling comprised in the premises use in common with the occupiers of any other such dwelling; and

(ii) any such dwelling in which the constable has reasonable grounds for believing that the person whom he is seeking may be.

(3) The powers of entry and search conferred by this section are only exercisable for the purposes specified in subsection (l)(c)(ii) above by a constable in uniform.

(4) The power of search conferred by this section is only a power to search to the extent that is reasonably required for the purpose for which the power of entry is exercised.

(5) Subject to subsection (6) below, all the rules of common law under which a constable has power to enter premises without a warrant are hereby abolished.

(6) Nothing in subsection (5) above affects any power of entry to deal with or prevent a breach of the peace.

It will be noted that, except for the power of entry to deal with or prevent a breach of the peace, subsection (5) abolished all the common law rules relating to a constable's power of entry without a warrant. (The power to use reasonable force is found in s. 117(1)).

The statutory provision relied on by the police in this case was, of course, s. 17(1)(d), and therefore, to justify entry for the purpose of recapturing the patient, she has to be a person

(1) who was unlawfully at large and
(2) whom the police were pursuing.

The first requirement takes me to the circumstances, already mentioned, in which the patient was admitted to the hospital and later left it and to the statutory background consisting of the relevant provisions of the Act of 1983. The effect of ss. 2(1) and (4) is that a patient may be

admitted to hospital for assessment and detained there for a period not exceeding 28 days if the application for admission is made in accordance with subsections (2) and (3). Section 6(1) provides that a duly completed application for the admission of a patient shall be sufficient authority to take the patient and convey him to hospital. There follow a number of provisions which it may be convenient to set out at this point:

6(2) Where a patient is admitted within the said period to the hospital specified in such an application as is mentioned in subsection (1) above, or, being within that hospital, is treated by virtue of s. 5 above as if he had been so admitted, the application shall be sufficient authority for the managers to detain the patient in the hospital in accordance with the provisions of this Act ...

17(1) The responsible medical officer may grant to any patient who is for the time being liable to be detained in a hospital under this part of this Act leave to be absent from the hospital subject to such conditions (if any) as that officer considers necessary in the interests of the patient or for the protection of other persons.

(3) Where it appears to the responsible medical officer that it is necessary so to do in the interests of the patient or for the protection of other persons, he may, upon granting leave of absence under this section, direct that the patient remain in custody during his absence; and where leave of absence is so granted the patient may be kept in the custody of any officer on the staff of the hospital, or of any other person authorised in writing by the managers of the hospital or, if the patient is required in accordance with conditions imposed on the grant of leave of absence to reside in another hospital, of any officer on the staff of that other hospital.

...

18(1) Where a patient who is for the time being liable to be detained under this part of this Act in a hospital -

(a) absents himself from the hospital without leave granted under s. 17 above; or

(b) fails to return to the hospital on any occasion on which, or at the expiration of any period for which, leave of absence was granted to him under that section, or upon being recalled under that section; or

(c) absents himself without permission from any place where he is required to reside in accordance with conditions imposed on the grant of leave of absence under this section.

He may, subject to the provisions of this section, be taken into custody and returned to the hospital or place by any approved social worker, by any officer on the staff of the hospital, by any constable, or by any person authorised in writing by the managers of the hospital.

...

(3) Where a patient who is for the time being subject to guardianship under this part of this Act absents himself without the leave of the guardian from the place at which he is required by the guardian to reside, he may, subject to the provisions of this section, be taken into custody and returned to that place by any officer on the staff of a local social services authority, by any constable, or by any person authorised in writing by the guardian or a local social services authority.

(4) A patient shall not be taken into custody under this section after the expiration of the period of 28 days beginning with the first day of his absence without leave; and a patient who has not returned or been taken into custody under this section within the said period shall cease to be liable to be detained or subject to guardianship, as the case may be, at the expiration of that period.

...

(6) In this Act 'absent without leave' means absent from any hospital or other place and liable to be taken into custody and returned under this section, and related expressions shall be construed accordingly.

46(1) The Secretary of State may by warrant direct that any person who, by virtue of any enactment to which this subsection applies, is required to be kept in custody during Her Majesty's pleasure or until the directions of Her Majesty are known shall be detained in such hospital (not being a mental nursing home) as may be specified in the warrant and, where that person is not already detained in the hospital, give directions for his removal there.

(2) The enactments to which subsection (1) above applies are s. 16 of the Courts-Martial (Appeals) Act 1968, s. 116 of the Army Act 1955, s. 116 of the Air Force Act 1955 and s. 63 of the Naval Discipline Act 1957.

128(1) Where any person induces or knowingly assists another person who is liable to be detained in a hospital within the meaning of Part II of this Act or is subject to guardianship under this Act to absent himself without leave he shall be guilty of an offence.

(2) Where any person induces or knowingly assists another person who is in legal custody by virtue of s. 137 below to escape from such custody he shall be guilty of an offence.

(3) Where any person knowingly harbours a patient who is absent without leave or is otherwise at large and liable to be retaken under this Act or gives him any assistance with intent to prevent, hinder or interfere with his being taken into custody or returned to the hospital or other place where he ought to be he shall be guilty of an offence.

...

135(2) If it appears to a justice of the peace, on information on oath laid by any constable or other person who is authorised by or under this Act or under s. 83 of the Mental Health (Scotland) Act 1960 to take a patient to any place, or to take into custody or retake a patient who is liable under this Act or under the said s. 83 to be so taken or retaken -

(a) that there is reasonable cause to believe that the patient is to be found on premises within the jurisdiction of the justice; and

(b) that admission to the premises has been refused or that a refusal of such admission is apprehended,

the justice may issue a warrant authorising any constable [named in the warrant] to enter the premises, if need be by force, and remove the patient.

(3) A patient who is removed to a place of safety in the execution of a warrant issued under this section may be detained there for a period not exceeding 72 hours.

(6) In this section 'place of safety' means residential accommodation provided by a local social services authority under part III of the National Assistance Act 1948 or under paragraph 2 of Schedule 8 to the National Health Service Act 1977, a hospital as defined by this Act, a police station, a mental nursing home or residential home for mentally disordered persons or any other suitable place the occupier of which is willing temporarily to receive the patient.

a (The words in subsection (2) "named in the warrant" were repealed by PACE s. 119(2) and Schedule 7.)

137(1) Any person required or authorised by or by virtue of this Act to be conveyed to any place or to be kept in custody or detained in a *b* place of safety or at any place to which he is taken under s. 42(6) above shall, while being so conveyed, detained or kept, as the case may be, be deemed to be in legal custody.

(2) A constable or any other person required or authorised by or by virtue of this Act to take *c* any person into custody, or to convey or detain any person shall, for the purpose of taking him into custody or conveying or detaining him, have all the powers, authorities, protection and privileges which a constable has within the area for which he acts as constable.

d (3) In this section 'convey' includes any other expression denoting removal from one place to another.

138(1) If any person who is in legal custody by virtue of s. 137 above escapes, he may, subject to the provisions of this section, be retaken -

e

(a) in any case, by the person who had his custody immediately before the escape, or any constable or approved social worker;

(b) if at the time of the escape he was liable to be detained in the hospital within the meaning of part II of this Act, or *f* subject to guardianship under this Act, by any other person who could take him into custody under s. 18 above if he had absented himself without leave.

(2) A person to whom paragraph (b) of subsection (1) above applies shall not be retaken under this section after the *g* expiration of the period within which he could be retaken under s. 18 above if he had absented himself without leave on the day of the escape unless he is subject to a restriction order under part III of this Act or an order or direction having the same effect as such an order; and subsection (4) of the said s. 18 shall apply with the necessary *h* modifications accordingly.

...

(4) This section, so far as it relates to the escape of a person liable to be detained in a hospital within the meaning of part II of this Act, shall apply in relation to a person who *i* escapes -

(a) while being taken to or from such a hospital in pursuance of regulations under s. 19 above, or of any order, direction or authorisation under part III or VI of this Act (other than under ss. 35, 36, 38, 53, 83 or 85) or under s. 123 above; or

(b) while being taken to or detained in a place of safety in pursuance of an order under part III of this Act (other than under s. 35, 36 or 38 above) pending his admission to such a hospital

as if he were liable to be detained in that hospital and, if he had not previously been received in that hospital, as if he had been so received.

...

(6) Section 21 above shall with any necessary modifications, apply in relation to a patient, who is at large and liable to be retaken by virtue of this section as it applies in relation to a patient who is absent without leave and references in that section to s. 18 above shall be construed accordingly.

Mr. Kurrein, for the appellant, submitted that the Courts below had erred in law in holding that the two requirements of s. 17(1)(d) of PACE were satisfied. On the question whether the patient was unlawfully at large, he drew attention to s. 18 of the Act of 1983, which deals with absence without leave having been granted under s. 17 and he contrasted that absence with escaping from legal custody or from a form of constraint which is deemed to amount to legal custody, as described in ss. 137 and 138 of the Act of 1983. He fortified his argument by referring to the contrast which is drawn by s. 128(1) and (2) between absence without leave and escaping from legal custody. Only a person who has escaped from actual or deemed legal custody, he continued, is a person "unlawfully at large": the patient here was merely absent without leave and was not within the terms of s. 137; therefore she was not unlawfully at large when the police came to retake her. Therefore, he claimed, the respondent failed at the first hurdle erected by s. 17(1)(d) of PACE.

Mr. Collins QC, for the respondent, "lukewarmly", as he frankly avowed, submitted that the patient was covered by s. 137 and therefore was deemed to have escaped from legal custody, from which it would follow that she was unlawfully at large. His alternative argument, by which he set greater store, was that the phrase "unlawfully at large" was not a technical expression and aptly described the patient, given that she had without leave absented herself from the hospital where she was lawfully detained.

As to the second requirement of s. 17(1)(d), Mr. Kurrein submitted that the words "whom he is pursuing" did not aptly describe the situation in the instant case, where the police, acting on information received, had gone to the house where (correctly, as it turned out) they believed the patient to be, since "pursuing" inevitably involved the idea of physical proximity and immediacy, a physical chase in the course of which the pursuer follows his quarry with the intention of overtaking and capturing the object of the pursuit.

Mr. Collins, while admitting that some limiting significance must be given to the words "whom he is pursuing", submitted that the police were indeed "pursuing" the patient when they went to the house and he also stressed the point that the finding of the Crown Court on this question was a finding of fact. My Lords, I now consider the rival contentions.

I am, in the first place, impressed by the proposition that a patient who is absent from the hospital without leave is not **for that reason alone** to be deemed to be a person who has escaped from legal custody. Section 128 of the 1983 Act gives strong support to the appellant and a careful study of s. 137(1) also leads me to the conclusion that none of the three things there required or authorised to be done to a person is consistent with the plight of the patient before she went absent from the hospital: the words "required or authorised to be conveyed" are certainly not apt; the words "detained in a place of safety" (which seem to look back to s. 135) do not, either immediately or when one considers how "a place of safety" is treated elsewhere in the Act of 1983, accord with the situation of a person who is admitted to hospital for assessment; and the phrase "kept in custody" is found in s. 46(1) of the Act of 1983 with a meaning which if imported into s. 137(1), as I believe it must be, does not help the respondent. It would indeed be remarkable if the phrase "kept in custody" were so general in its meaning as to apply to every person who is detained in accordance with the Act: this would make nonsense of the contrast in s. 128 which has already been noted. The words in

s. 138(1)(b) "if at the time of the escape he was liable to be detained in a hospital" do not show that **all** persons whom those words describe are in legal custody. They merely extend the category of persons who can retake the escaper if the condition in s. 138(1)(b) is fulfilled. The same argument and counterargument could be applied to a person who is subject to guardianship under the Act of 1983, but s. 18 shows that a person who is subject to guardianship could not by virtue of that circumstance alone be, or be deemed to be, in legal custody.

Dealing with Mr. Kurrein's contrast between s. 18 and s. 137, Otton J. said:

> I do not accept this argument. Mr. Stage took us through a body of old common law relating to the powers of arrest in relation to felonies and misdemeanours. I do not think it is necessary to do so. The answer is to be found in s. 137(1) ... Thus the authority to be kept etc. stems from any part of the Act, and not merely from part II. She was thus deemed to be in legal custody under s. 137 which is in part X.

With respect, I cannot accept the Judge's conclusion as to the effect of s. 137(1), but the ability to distinguish between being detained in a hospital under s. 6(2) and being in actual or deemed legal custody does not in my opinion conclude this part of the argument in favour of the appellant. I accept the submission of Mr. Collins that the expression "unlawfully at large" does not have a technical or special meaning. A person who is detained in hospital under s. 6(2) is lawfully detained. If he goes absent without leave, he is then at large, as the words in s. 128(3) "otherwise at large" plainly indicate, and, since he ought not to be at large and is, by virtue of s. 18(1), liable to be taken into custody and returned to the hospital, he would inevitably appear to be **unlawfully** at large until he is taken into custody.

During argument a question was raised with Mr. Kurrein as to the effect of the words in s. 17(3) of the Act of 1983 "direct that the patient remain in custody", as possibly showing that the patient was already in custody before obtaining leave of absence. Mr. Kurrein's answer to this potentially unfavourable inference was that the words "remain in custody" could mean not only "still be in custody" but also "be in custody continuously while absent with leave". Even this explanation leaves the patient "in custody", and I think that a more helpful explanation from the appellant's point of view may be that the custody spoken of in s. 17(3) is not legal custody, which means the custody **of the law** (as distinct from proper or lawful custody) and is a technical expression. Nor is custody under s. 17(3) **deemed** to be legal custody by s. 137(1) or by any other provision.

I should also mention that the appellant sought to found an argument on the fact that s. 135(2) empowers a justice to issue a warrant authorising any constable to enter, if need be by force, premises where a patient is reasonably believed to be, and to remove the patient. He submitted that an application for a warrant was the **designated** way of retaking a patient who was believed to be in a house but was not covered by s. 137(1) and that there were no circumstances in which one could reach the stage of having to consider the second requirement of s. 17(1)(d) in relation to such a patient. My Lords, I am unable to view s. 135(2) in this light, because I believe that it provides an alternative to s. 17(1)(d) and not the **exclusive** method of gaining access to premises in order to retake a patient such as Mrs. D'Souza.

In his very helpful annotated edition of "The Police and Criminal Evidence Act 1984" 2nd Edn., [1990], Professor Michael Zander comments, at p. 42 on s. 17(1)(d):

> This reproduces the common law power. It includes those who have escaped from a prison, or of a court or of the police (sic) and those who have absconded from detention in mental hospitals or other institutions of compulsory detention. It is not certain whether the power only exists in hot pursuit.

This comment, which was reproduced by Otton J. in his judgment, indicates the view of the learned author that a patient such as Mrs. D'Souza who absconded from lawful detention in a mental hospital, either before or after PACE came into operation, would be "unlawfully at large", although not necessarily by virtue of s. 137(1) or any earlier provision to the like effect. I turn now to the second question on the basis, which I regard as justified, that the patient was "unlawfully at large". Was she a person "whom the constables were pursuing"?

That question, I admit, is a question of fact but, like all such questions, it must be answered within the relevant legal principles and paying regard to the meaning in their context of the relevant words (in this case the words "whom he is pursuing" in s. 17(1)(d).) The material

portion of the judgment in the Divisional Court, the paragraphs of which I have numbered for convenience, was as follows:

1. There can be no doubt that the officers were 'pursuing' the patient in the sense that they were following her with intent to capture her (see Shorter Oxford English Dictionary). Although there is authority that, where the police are pursuing a person for an arrestable offence, the pursuit should be "hot", for my part I do not regard this as a desirable criterion or prerequisite to the pursuit and arrest of a patient who is suffering from a mental illness.
2. Sometimes the circumstances call for quick and decisive action to avoid danger to others and the patient. But any idea that every pursuit has to be "hot" in the sense of rapid and calling for immediate action and entry is clearly undesirable. This type of situation often calls for patience, sensitivity, calmness and tact. The manner in which a pursuit is effected must be a matter for the discretion and judgment of those handling the situation. In summary those responsible have a choice whether
   (1) to apply for a warrant (there is no obligation to do so)
   (2) or to pursue without a warrant
   (3) if the latter, to pursue 'hotly' or with circumspection until they judge it expedient to enter and arrest.
3. Here those seeking to retake the patient here had consulted the records at the hospital and had no doubt seen the reports, in particular that of Dr. Higginson, who had described a history of paranoid schizophrenia and 'it is very possible that she is on the verge of another breakdown etc.' It was accordingly apparent to those responsible that it was necessary to mount a pursuit and not delay to obtain a warrant.
4. Thus it was open to the Crown Court to find, on the material before it, that it was a proper exercise of the powers of discretion of those seeking to retake the escaped patient and that they were lawfully pursuing her. On this analysis the justices were justified in finding that the constables were pursuing the patient when they followed her to the house in order to recapture her and return her to hospital, and under s. 117 of the Police and Criminal Evidence Act were permitted to use reasonable force if necessary.

Before commenting on the judgment I wish to take the matter a little further. The position about persons escaping from custody is summarised in Clerk & Lindsell on Torts, 16th Edn., [1989] at paragraph 17-44:

> *Escape from Custody*. A person who has escaped from lawful custody is still considered theoretically a prisoner, and his recapture is but a continuance of his former imprisonment. Recapture may therefore be effected without the restrictions as to time or place which may have been attached to the original execution of the process against him. A person privileged from arrest is not privileged from recapture. In effecting a recapture, at any rate upon a fresh pursuit, **it was probably lawful at common law** to break open the outer door of a dwelling-house. And, on this principle, it was held that where a party had been formally arrested by touching him through a broken window it was lawful thereupon to break into the house in order to effect his actual apprehension. [Section 17(1)(d) of the Police and Criminal Evidence Act 1984 now empowers a constable to enter and search any premises for the purpose of '... recapturing a person who is unlawfully at large and whom he is pursuing.' Section 17(1)(d) would thus authorise entry where an arrested person breaks free and flees from the constable who has arrested him and is chased by that constable and his colleagues. It is more doubtful that it authorises entry and search on information to the police that prisoner X, who escaped from custody some time ago, is now to be found in certain premises. Police in that case may have to seek a search warrant or rely on other powers of entry conferred on them by the Act of 1984.]

The text (as well as the footnotes) of the 15th Edn., [1982] of Clerk & Lindsell paragraph 14-65 is almost identical with that of paragraph 17-44 of the 16th Edn., before the new part, which I have put in square brackets, with one exception: in the fourth sentence, instead of the words "it was probably lawful at common law", which I have emphasised above, we find in the earlier edition the words "it is lawful". It can be seen, therefore, that, at least in the opinion of the learned editors, the old common law provides a reliable guide to the meaning of s. 17(1)(d) which has replaced it. Further light is cast on the common law position by *Hart v. Chief Constable of Kent* [1983] R.T.R. 484, which was mentioned in the appellant's case but not in argument. The defendant had an accident while driving a car and was tracked to his home by a police dog. He gave a positive specimen of breath standing partly inside and partly outside the house. A constable told the defendant he was arresting him and took hold of him. The defendant pulled back into the house and a struggle ensued in the course of which the constable and another policeman

entered the house. The defendant's mother asked the police to leave and they did so, retaining their hold on the defendant, who was later charged with failing to provide a specimen of blood or urine and with assaulting a constable in the execution of his duty. If, as the defence contended, the police were trespassers in the house, that fact would have provided a defence directly to the assault charge and indirectly to the road traffic charge. McCullough J., sitting in the Divisional Court with Griffiths LJ, delivered the judgment of the Court in favour of the Crown. He reviewed a number of ancient authorities and said, at pp. 489-490:

> Accordingly, the arrest of the defendant by officers who remained outside his house on land where they were still authorised to be was lawful. Thereafter, they were not engaged in attempting to arrest the defendant. They were engaged in the essentially different exercise of recapturing a prisoner who had escaped from lawful custody. The question which therefore arises in this case is whether such a prisoner can make good his escape from lawful custody by reaching his dwelling house and by refusing permission to enter to the officers pursuing him ... The rights of officers pursuing those who have escaped are not affected by ss. 2 and 3 of the Criminal Law Act 1967. They derive from the common law, and they include the right to break into a dwelling house if need be.

In Foster's Crown Cases 3rd Edn., (1792), p. 320 it is said:

> ... if a man, being legally arrested, ... escapeth from the officer and taketh shelter, **though in his own house,** the officer may, upon fresh suit, break open doors in order to retake him. ...

(Note: "suit" is an equivalent of "pursuit", now obsolete.)

Many of the illustrations of pursuit (which made it lawful to enter premises without a warrant in order to recapture an escaper) describe recapture by the very constable from whom the person arrested has escaped. I am not, however, saying that s. 17(1)(d) applies only in such circumstances. I would assume that the power of entry to recapture can apply in a case like the present, provided the constable is "pursuing" the patient. But even so, I cannot find any evidence from which pursuit by the constables before the break-in can be inferred. The verb in the clause "whom he is pursuing" is in the **present continuous** tense and therefore, give or take a few seconds or minutes - this is a question of degree -, the pursuit must be almost contemporaneous with the entry into the premises. There must, I consider, be an act of pursuit, that is, a chase, however short in time and distance. It is not enough for the police to form an intention to arrest, which they put into practice by resorting to the premises where they believe that the person whom they seek may be found. I turn to the judgment in the Divisional Court.

It starts by saying that there can be no doubt that the officers were "pursuing" the patient in the sense that they were following her with intent to capture her. My Lords, with respect, this observation avoids the real question. The word "follow" can be used in different senses as, for example, in the direction "Follow that car", which may be contrasted with the statement "You go to London today and I will follow on Saturday." The primary dictionary meaning of "follow" is "go after (a moving thing or person)" and I suggest that that meaning must be akin to the sense in which the word "pursuing" is used in s. 17(1)(d). As I said, Mr. Collins conceded that the requirement of "pursuing" must limit the circumstances in which entry without a warrant can take place, but, understandably, he was quite unable to explain what limitation the clause in question could impose short of satisfying the criterion laid down by the ordinary meaning of "pursuing" and by the common law, as contended for by Mr. Kurrein. Section 17(2)(a) applies to every paragraph except (e) of s. 17(1) and therefore every constable who intends to arrest a person is **seeking** him and is obliged to have reasonable grounds for believing him to be on the premises which he proposes to enter. During argument my noble and learned friend, Lord Jauncey of Tullichettle suggested what, if he will permit me to say so, I found to be a most convincing analysis of s. 17(1), pointing out that paragraph (a) demanded the possession of a warrant, paragraph (b) dealt with offences of a serious class, paragraph (c) named specific offences the nature of which was considered to justify entry and paragraph (e) dealt with two very urgent situations, whereas entry without a warrant under paragraph (d) for the purpose of recapturing a person who was unlawfully at large could be made only if the constable were **pursuing** that person and not in any other circumstances. Therefore a constable, acting on information received but not being in

possession of a warrant, who simply goes to a house where he reasonably (and correctly) believes that the person he is seeking can be found cannot, in my opinion, conceivably say that he is pursuing that person. To do so would empty the word "pursuing" of all meaning. The word "seek" in s. 17(2)(a) has a primary meaning "to go in search or quest of, to try to find, look for". It applies to every paragraph of s. 17(1). Pursuing is one manifestation of seeking, but the latter word is not included in or equated by the former.

Paragraph 2 of my extract from the judgment states that there may be different types of pursuit, depending on the needs of the situation. This applies to the hunting of any quarry, which may be chased at full speed, stalked with stealth or covertly surrounded. But, whatever the method, pursuit is the common characteristic of the operation. It is then said that those responsible

> have a choice whether
>
> (1) to apply for a warrant (there is no obligation to do so)
> (2) or to pursue without a warrant
> (3) if the latter, to pursue 'hotly' or with circumspection until they judge it expedient to enter and arrest.

If this statement means that a warrant is not necessary in any circumstances and that the police, if they receive instructions to take a patient into custody, have only to go and enter, using reasonable force, the house where they reasonably believe him to be (and that this will mean that they are pursuing the patient), I must respectfully disagree.

Paragraph 3 concludes, "It was accordingly apparent to those responsible that it was necessary to mount a pursuit and not delay to obtain a warrant." The words "mount a pursuit" relate back to the conscious decision envisaged in choice (2) of paragraph 2, as if a decision taken at the police station to "mount a pursuit" of someone who is at that moment sitting, or perhaps sleeping, at home meant that the constables who were dispatched to the patient's house would be "pursuing" him. I have already explained why I cannot accept a meaning of pursuit which would be seen to fit the action taken in those circumstances to the requirements of s.17(1)(d). On the question of urgency, which is marginal to the legal point at issue, I cannot help pointing out that, her husband having left the hospital at 3.30 p.m., the patient was at home by 3.55 p.m. and the police did not reach the house until 7 p.m. Moreover, ss. 17(1)(e) and 17(6) can be resorted to without a warrant if, which has not been suggested in the present case, a real emergency is believed to exist. If the legislature had intended the police to have a right of entry to premises in order to recapture absconding patients independently of PACE or of the law in force in 1983, I would have expected an express enactment to that effect. So far from that having happened, s. 135(2) of the Act of 1983 expressly authorises the issue of a warrant to retake a patient, and this provision must be regarded as superfluous if the respondent's case and the Divisional Court's judgment are correct.

Coming to paragraph 4, I do not consider that it was open to the Crown Court to find that "those seeking to retake the escaped patient", and in particular the constables concerned, were pursuing her, because there was in my view no material in the facts found on which (taking a proper view of the law) they could properly reach that conclusion. In *Edwards v. Bairstow* [1956] A.C. 14, which was concerned with a finding of fact, Lord Radcliffe said, at p. 36:

> When the case comes before the Court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.

My Lords, If I had to answer the first of the certified questions, I would answer it in the negative, but, strictly speaking, that question is irrelevant, according to the view which I have taken, to the first issue which your Lordships have to decide. Indeed, according to my view, even a more widely drawn question, raising the issue whether the patient was unlawfully at large, would be unnecessary to the final determination which I am proposing.

As to the second question, the reference to "hot pursuit" introduces an element of confusion. What s. 17(1)(d) of PACE requires is pursuit by the constable in addition to an intention to arrest followed by resort to the premises where he reasonably believes that the person he is seeking can be found.

Therefore, my Lords, without answering the certified questions, I would for the reasons I have given remit the case stated to the Crown Court with a direction

(1) to revoke the orders that the appellant be conditionally discharged and that she pay compensation and
(2) to dismiss the charges brought against her.

Lord Browne-Wilkinson

My Lords,

I have read the speech of my noble and learned friend Lord Lowry and, for the reasons which he gives, would remit the case stated to the Crown Court with the directions which he proposes.

NEAT HOLDINGS PTY. LIMITED

v.

KARAJAN HOLDINGS PTY. LIMITED & ORS.

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, TOOHEY & GAUDRON JJ.
[F.C. 92/053]
16 DECEMBER 1992

EVIDENCE: Standard of proof - Balance of probabilities

CONTRACT: Misrepresentation.

TORT: Deceit - Negligent misstatement.

CRIMINAL LAW: Forgery - Fraud - Section 52 Trade Practices Act 1974 - s. 10 Fair Trading Act 1987.

The respondents sold a business to the appellants. The respondents' directors made representations to the appellants director which included a business profile showing an average weekly turnover of $5,793. After the take-over the weekly takings amounted to $3,000 only. The appellants later rescinded the contract in writing on the ground of misrepresentation. The trial Judge gave his decision in favour of the appellants. On appeal this decision was set aside. The respondents' appeal was on the ground that the trial Judge did not direct himself and disregarded the degree of exactness of proof required in the case of an alleged fraud. Moreover he did not state his reasons for concluding that the respondents misrepresented the weekly turnover of the business and that the weekly takings book did not give an accurate record of the weekly takings of the business.

Held:

By Mason CJ, Brennan, Deane & Gaudron JJ.

The trial Judge's judgment was not vitiated by the failure to make or to advert to the need to make any necessary finding in relation to the respondent's weekly takings book. Nor was his decision vitiated by any failure to disclose the reasoning behind his conclusion that the respondents were guilty of deceit.

By Toohey J.

The trial Judge did not direct his attention to the degree of proof required in this case and did